No. 15,467

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHMOND INVESTMENT COMPANY,
IRENE WOODS, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' CLOSING BRIEF.

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APPELLANTS' CLOSING BRIEF.

This review on appeal seems to be narrowed in scope by the failure of Appellee to dispute the soundness of the single points and authorities submitted in Appellants' opening brief. Instead, the Appellee attempts to slam the door tightly shut against a hearing on the Appellants' position in eminent domain, and to lock the door with the *Lewis* case, *Lewis v. United States*, 200 F. 2d 183, 345 U.S. 907. Appellee does not deny that some of the Appellants herein were not parties in the *Lewis* case. In attempting to further bolt the door, against a hearing, the Appellee quotes from the opinion of the Court written in support of the decision in the *Lewis* case as the conclud-

ing last word, apparently assuming that this Court will refuse to re-examine or clarify its statements of the law of eminent domain, as they may be reapplied in the present case.

If we are to follow blindly and literally the expressions of opinion and conclusions of law in the *Lewis* case, as conclusively determining the application of the law in eminent domain in the present case, we then feel the need of reconciling as well as the other decisions of the 9th Circuit in eminent domain with which the *Lewis* case conflicts.

Appellee's position would require a reversal of the rulings and decisions of this Court in the following cases:

> *Warm Springs Irr. Dist. v. Pacific L. A. Co.* (9th Circuit), 270 Fed. 560.
>
> Held: that where the interest to be taken by condemnation is not expressly stated in the statute, the condemnor is presumed to take *no greater interest than an easement, if an easement is sufficient to satisfy the purpose of the taking.*

> *E. C. Shevlin Co. v. U. S.* (9th Circuit), 146 F. 2d 613 at 615.
>
> Held: that failure or omission of the condemning agency of the Government to allege and prove affirmatively that fee title is the necessary quantum for the particular temporary use authorized, is an admission that no necessity exists beyond the temporary use intended.

A. DISCRETIONARY POWER IN QUESTION NOT EXPRESSLY DELEGATED BY CONGRESS TO AGENCY.

The *Lewis* case *does not hold* that the Lanham Act EXPRESSLY delegates discretionary power to the Housing Administrator to take BY CONDEMNATION, whatever quantum of interest in privately owned lands he might choose or in his own personal opinion deem proper. Consequently if the agency elects *to condemn,* it automatically submits to the restrictions imposed in eminent domain. This is the turning point of the present case.

If that discretionary power is not so delegated *expressly* by Congress, are we to assume that the *Lewis* case is to be arbitrarily followed on the theory that such discretionary power can be IMPLIED by the Housing Administrator or by the Court when omitted by Congress in the Lanham Act? Such omission by Congress is presumably intentional.

We do not believe that the *Lewis* case can properly be cited as *stare decisis* or intended to establish or perpetuate any such rule of law of implied powers in eminent domain on the records of this Court. If appellee's contention is correct then this case must be deemed also to reverse the rules of law in eminent domain as applied in each of the unchallenged authorities cited by Appellants in their opening brief herein, beginning on page 12, Sec. 3, Applicable Rules in Eminent Domain.

Appellee's brief herein evades, ignores and fails to make any attempt to answer the vital and basic issue of the law in the present case:

> Did Congress in the Lanham Act, EXPRESSLY authorize the Housing Administrator to exercise his uncontrolled discretion in taking by *condemnation,* more than a temporary quantum of interest in private lands for merely the temporary wartime housing described in the Act?

It is significant that the Appellee's brief makes no attempt whatever to meet the issues of law presented in Appellants' brief. That Appellee's reasoning is obscure is illustrated by the "statement" beginning on page 4 of Appellee's brief, as follows:

> "The court found, inter alia, that the Acting Commissioner of the Federal Public Housing Authority had *selected* the condemned lands for use in connection with public housing and that he did not act in bad faith or abuse his discretion in making his determination (Fdg. IV, R. 24)."
>
> "The court concluded that the Commissioner acted within the scope of his power and authority in *selecting* the lands and that 'his determination that a fee interest in said lands should be taken as final'." (Our italics.)

Obviously this appeal does not involve any issue as to the Housing Commissioner's *"selection"* of the lands to be condemned.

In the case of *Warm Springs Irr. Dist. v. Pacific Live Stock Co.* (1921), 270 Fed. 560, the 9th Circuit Court stated the following rule in eminent domain:

> "The authority to condemn will be strictly construed in favor of the owner of the property taken against the condemnor, and the authority must be strictly pursued."

This rule has become well established and the *Warm Springs* case has been frequently cited. Accordingly if the Lanham Act is to be strictly construed at least in so far as it applies to condemnations, we have in vain asked Appellee to quote the specific provision of the Lanham Act relied upon in claiming that the Lanham Act expressly delegated *discretionary powers* to the Administrator to acquire private land "at his discretion" or to take whatever quantum of interest "which *in his opinion* will be most advantageous to the Government." Such express provisions do not exist. They could not be found in the *Lewis* case, and cannot be found in the present case, although this is a vital issue now before this Court. Our repetition of this point of law is prompted only by an earnest desire for a specific ruling by the Court to which we believe the Appellants are entitled.

If the Appellee contends that the discretionary powers in question can be *implied*, he cannot cite any authority in eminent domain holding that such discretionary powers may be *implied*.

To the contrary the Courts have consistently followed the rule as stated in Lewis on Eminent Domain, Vol. I, Sec. 371:

> "The exercise of the power of eminent domain being against common right, cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. When the right to exercise the power can only be made out of argument and inference, it does not exist."

Authorities are cited in Appellants' opening brief herein consistent with the above rule. In connection with this basic point it is interesting to note that in the Tenn. Valley Authority Act, Congress left nothing to be implied but deemed it necessary to state expressly its grant to the Authority of the desired discretionary powers to condemn any interest in property that it "deems necessary for carrying out the purposes of this Act." No such provision was written by Congress into the Lanham Act.

It follows that this point should properly be clarified by the 9th Circuit Court in the present case, without curtailment of its judicial powers on the theory of *stare decisis* which Appellee contends was originated by its decision in the *Lewis* case.

B. ANALYSIS OF OPINION AND CONCLUSIONS IN THE LEWIS CASE, AND NEED FOR CLARIFICATION AND RESTATEMENT OF PRINCIPLES OF LAW IN EMINENT DOMAIN.

Inasmuch as the Appellee relies solely upon the *Lewis* case as being *stare decisis* in the present case, it seems necessary and proper to examine why it should not be held conclusive and binding upon the appellants herein, particularly those who were not parties to that case.

Analysis of statements of law in Lewis case.

The opinion of the Court in the *Lewis* case, 200 F. 2d 183 at page 184, headnote No. 1 is respectfully referred to for analysis.

It is submitted that the reasoning and conclusions as expressed in this paragraph are not clear:

> "And it now is well established that the *government's* power to condemn is coextensive with its power to purchase. . . . *Thus,* if the *Administrator* might purchase the fee simple title in property for use under the provisions of the Lanham Act, he may also acquire the fee simple title by condemnation proceedings." (Our italics.)

Without question, the first sentence above is a correct statement of the power of the *"government",* acting, however through Congress. But what about an agency of the government? The *Administrator,* the housing agency in this case, has no such inherent or constitutional power in eminent domain. Until Congress expressly delegates that power to him, and then only to the extent that Congress expressly and specifically so delegates the power, no such power can be *implied* to an Agency. (We refer to the citations of authority in our opening brief.) Was the decision in the *Lewis* case intended to establish such rule of implied power? We believe not.

When the statement in the opinion in question refers to the power of *Government* in eminent domain, and then concludes that the agency "thus" has the discretionary power to take the fee simple title for the temporary use described in the Lanham Act, the conditional "if" is apparently used as an affirmation and a conclusion. It would not follow that merely because the Government has the power, that the administrator likewise has the same power by implica-

tion. Are Appellants asking too much for a ruling on this point?

The statement further overlooks a serious question in eminent domain whether, under the authorization as enacted by Congress in the Lanham Act, it can be implied that the agency could even *purchase* the fee title absolute for merely a *temporary* housing use. It should be noted here that when these actions were filed, the agency actually elected *temporary* housing as the public use intended for temporary war workers within the narrow category stated in the Lanham Act. We know of no instances under the Lanham Act, other than the *Lewis* case and the present case, in which the permanent fee title was either purchased or condemned for *temporary* housing use.

In the paragraph of the opinion referred to as Headnotes 3-5 at page 185 in 200 F. 2d, indicates certain weight given to the circumstance that,

> "The Lanham Act does not limit the quantum of interest in property which may be taken for public use."

It is not clear and does not seem to follow that merely because the Lanham Act does not expressly "limit" the quantum of interest in land which may be acquired, that

> "The Administrator was *thus* given *discretion* to *acquire* either the entire fee, or a lesser interest in the land."

This is the *implied* discretionary power upon which the Appellee obviously relies, as the next paragraph

of the opinion states the implied conclusion that,

> "Congress, by the Lanham Act, has empowered the Administrator *at his discretion* to acquire the land needed for defense housing by condemnation, and to take the interest which *in his opinion* will me most advantageous to the Government." (Our italics.)

The statement of implied conclusions contained in this paragraph of the opinion relied upon two authorities therein cited. Both of the authorities, cited by Appellee, as well as *Simmonds v. U. S.* (9th Circuit), 199 Fed. 305, are cases in which discretionary powers had been *expressly delegated by Congress* to the Secretary of War, and which are not delegated by Congress in the Lanham Act to the housing agency. The discretionary power in question was not *implied* in these cases. It was expressly delegated by Congress.

We do not believe the Appellee can reasonably contend that the Lanham Act was intended by Congress to be as broad as the 2nd War Powers Act in the delegation of discretionary powers, else Congress would have so stated its intentions in the Act itself.

CONCLUSIONS.

It is respectfully urged that judgment in this case turns upon a determination of the applicability of one well established rule or principle of law in eminent domain, that the delegation of discretionary powers to an agency cannot be IMPLIED. The rule as supported by numerous authorities might be more fully stated as follows:

> Where an Act of Congress (i.e. The Lanham Act) authorizing an Administrative Agency to take private lands by condemnation, *does not expressly* and unequivocally delegate to the Agency *discretionary power* to take whatever quantum of interest in said lands such Agency may choose to take, the quantum of taking is strictly limited to the temporary use as expressly described in the Act, and additional *discretionary power cannot be IMPLIED.*

If the Agency or the Court cannot *imply* such additional discretionary power by reading it into or between the lines of the particular Act of Congress in question, then the power to condemn an excess quantum such as the permanent fee title absolute for merely a temporary use does not exist.

It follows necessarily that the *Lewis* case or the doctrine of *stare decisis* cannot reverse the principles of law in eminent domain and create or imply such delegation of discretionary power unless the words are expressly and clearly used for all to read as part of the text of the Act of Congress relied upon by the agency claiming that power.

It is respectfully submitted that the judgment of the trial Court, herein condemning an excess quantum of interest in private lands, should be reversed.

Dated, San Francisco, California,
July 20, 1957.

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